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CONCORD, N.H.

Mr. James J. Barry, Commissioner
Department of Public Welfare
State House Annex
Concord, New Hampshire

Dear Mr. Barry:

This is in reply to your letter of November 24, 1958, in which you request our opinion with respect to certain questions which have arisen concerning the Portsmouth Homemaker Project which is to be sponsored and administered jointly by the Department of Public Welfare and the State Department of Health with funds made available to the latter through a Federal grant.

You first inquire whether any liability might be incurred by either department under the State Labor statutes in initiating and administering this program. Assistant Commissioner Thompson has advised us that you specifically wish to know whether either department becomes subject to the Workmen's Compensation Act. Our answer is in the negative. Your letter indicates that the persons who are to perform the homemaking functions will be recruited through the New Hampshire Employment Service to perform domestic services on an occasional and intermittent basis. Casual employment and domestic services are specifically excepted from operation of our Workmen's Compensation Act. See RSA 281:2, I.

Your second inquiry is whether either department might be held liable for the employer's share of Federal Old-Age and Survivors Insurance payments. The answer is in the negative. Under the Social Security Act the term "employee" means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . ." 42 U.S.C.A. s. 410(k)(2). At common law the relationship of employer and employee exists only when the person for whom the work is done has the right to control and direct the work not only as to the result to be accomplished by the work but as to the details and means by which that result is to be accomplished. 35 Am.Jur., Master and Servant, s. 3. From your letter and our conferences with Assistant Commissioner Thompson it is our understanding that neither of the two State Departments involved nor the director employed to supervise the project will exercise any control over the homemakers with respect to the services they perform either as to the

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Mr. James J. Barry, Commissioner

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result to be accomplished or
/details of the work. We thus conclude that the homemakers will not
be "employees" of any state agency within the meaning of the Social
Security Act.

Your final question is whether either
department might incur any liability with respect to any injuries
that might be sustained by the homemakers in performing homemaking
functions in private homes or while traveling to or from private homes.
We reply in the negative.

It is well established that the State
cannot be sued in the absence of a statute authorizing it or without
its consent either expressly given or clearly implied. Bow v. Plummer,
79 N.H. 23; St. Regis Paper Co. v. Water Resources Board, 97 N.H. 164;
Ham v. Maine-New Hampshire Interstate Bridge Authority, 92 N.H. 268.
While the legislature has authorized suits against the State for claims
founded upon express or implied contracts (RSA 491:8) no such consent
has been given for suits based upon claims for personal injuries or
property damage.

Very truly yours,

George T. Ray, Jr.
Assistant Attorney General

GTR,Jr/lt